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LETTER DATED 7 JUNE 1993 FROM THE PERMANENT REPRESENTATIVE OF
IRAQ TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

On instructions from my Government, I have the honour to transmit herewith a letter dated 6 June 1993 from Mr. Muhammed Said Al-Sahaf, Minister for Foreign Affairs of the Republic of Iraq, addressed to you on the subject of Security Council resolution 833 (1993).

I should be grateful if you would have this letter and its annex, the letter from the Minister for Foreign Affairs of the Republic of Iraq, circulated as a document of the Security Council.

(Signed) Nizar HAMDOON
Ambassador
Permanent Representative

Annex

Letter from the Minister for Foreign Affairs of Iraq
dated 6 June 1993 addressed to the Secretary-General

[Original: Arabic]

I have the honour to draw attention to the position of my Government on Security Council resolution 833 (1993), adopted on 27 May 1993. Pending our treatment of the matter in detail in the future, after all the completed documentation has arrived from the Commission and been studied by the competent authorities with due care and attention, I should like, on this occasion, to present to you the initial viewpoint of the Government of the Republic of Iraq on this question.

I. First of all, I should like to reaffirm once again what was stated in the letter dated 6 April 1991 from the Minister for Foreign Affairs of the Republic of Iraq addressed to the Secretary-General of the United Nations concerning Iraq's position on Security Council resolution 687 (1991), adopted on 4 April 1991, and what was stated in the letter about the question of the boundary between Iraq and Kuwait (S/22456).

II. I should like to reaffirm once again what was stated in section II of the letter dated 21 May 1992 from the Minister for Foreign Affairs of the Republic of Iraq addressed to you concerning the establishment of the Boundary Demarcation Commission (S/24044).

III. I should like also to reaffirm what was stated in section III of the letter dated 21 May 1992 from the Minister for Foreign Affairs of the Republic of Iraq addressed to you concerning a number of the decisions of the Boundary Demarcation Commission (S/24044).

IV. With regard to the Commission's decision on the demarcation of the offshore boundary in the Khawr Abdullah and its endorsement by the Council in resolution 833 (1993), I should like to draw attention to a number of blatant facts that indicate the great defectiveness characterizing the work of the Commission.

1. When the Commission first discussed the question of the demarcation of the offshore section of the boundary at its third session, held at Geneva from 12 to 16 August 1991, the Chairman of the Commission affirmed - and his understanding was shared by the two independent experts - that there was a difficulty in dealing with the offshore section of the boundary because of the nature or the limits of the mandate given to the Commission, which did not authorize it to deal with the boundary line beyond the junction of the Khawr al-Zubayr and the Khawr Abdullah (i.e., in the sea), unless the two parties so agreed, and that the Commission could, moreover, not confer powers on itself.

2. The representative of the rulers of Kuwait asked the Commission, during its fourth session in New York from 7 to 16 October 1991, that he should be afforded an opportunity to deliver a statement on the offshore section of the boundary at the next session. The Commission decided, in accordance with the adopted rules of procedure, to respond affirmatively to that request. When the representative of the rulers of Kuwait delivered his statement at the fifth session of the

Commission, held in New York from 8 to 12 April 1992, the above-mentioned representative discussed the mandate of the Commission and claimed that it included the demarcation of the offshore boundary. At the time when it was assumed that the Chairman of the Commission would announce the conclusion of its work on this question with the position affirmed by the Chairman and the two independent experts at the third session of the Commission, which is stated above, the Chairman of the Commission merely remained silent.

3. At the Commission's sixth session, held in New York from 15 to 24 July 1992, which was essentially devoted to consideration of the Commission's report on its work to the Secretary-General of the United Nations, the Secretariat once again included in the draft agenda submitted by the Chairman discussion of the offshore section of the boundary. The Commission's minutes, which recorded the facts of the discussions that took place on the subject at this session, clearly revealed to any objective and fair observer the acute differences that prevailed in the discussions of the Commission, particularly between the representative of the rulers of Kuwait and his advisers and the Chairman of the Commission, because of the Kuwaiti pressure on the Chairman and the two independent experts, to adopt the position of the rulers of Kuwait concerning the demarcation of the offshore boundary. The Chairman of the Commission did not hesitate to reveal many of the glaring facts regarding the above-mentioned pressure and the interventions of the Deputy Legal Counsel of the United Nations Secretariat in the work of the Commission.

The final outcome at this session was that the Commission, as stated in its press release issued on 24 July 1992, approved consideration of the Khawr Abdullah sector also and discussion of it at a meeting to be held for this purpose in October.

It should be noted that this press release contained details indicating that the decisions taken by the Commission on the demarcation of what was described as the land boundary did not detach Umm Qasr, oil wells and territory from Iraq for the sake of the opposing policy. It appears that that was done in implementation of what was dictated to the Chairman of the Commission and its two experts regarding the interpretation of the decisions taken by the Commission in order to counter the extensive clamour from the press, which took up the subject and reported a portion of the facts in many newspapers in the West and in the Arab countries. Then the Commission, at its seventh session, held in New York from 12 to 16 October 1992, continued discussion of the matter, in the light of the study submitted by the two independent experts, and requested them to continue collecting data on the question.

4. Two important developments occurred in this series of events. On 12 August 1992, the "further report" of the Boundary "Demarcation" Commission, completed at its sixth session, was transmitted to the President of the General Assembly. The letter of transmittal stated: "As far as the offshore boundary is concerned, the Council might wish to encourage the Commission to demarcate that part of the boundary as soon as possible, and thus complete its work. This statement was made even though the Secretariat knew full well that the Commission had not yet agreed that it was competent under its terms of reference to demarcate the offshore boundary and although its Chairman's position on this matter was very clear to it and reached the point of implied resignation if this matter was imposed on the Commission. This statement reinforces the impression

that the Rapporteur was prematurely responding to the wish of the rulers of Kuwait and the States which support it in the Security Council and which had planned from the beginning that the outcome of the Boundary Demarcation Commission's work should be what it turned out to be, in spite of opposing views and concepts. In fact, we find that the Security Council hastened to adopt resolution 773 (1992) on 26 August 1992, stating, in paragraph 3, that it welcomed the decision of the Commission to consider the eastern section of the boundary, which included the offshore boundary, and urging the Commission to demarcate that part of the boundary as soon as possible and thus complete its work. This clear correspondence between the language used in the transmittal of the Commission's report to the Security Council and in the language of Security Council resolution 773 (1992) and the background of established facts that emerge from the Commission's discussions reflect beyond any doubt or interpretation a coordinated effort undertaken by the rulers of Kuwait, well-known circles in the Secretariat and certain States members of the Security Council to orient the work of the Commission in a way contrary to the mandate laid down for it by the Council itself in resolution 687 (1991) and in the report of the Secretary-General submitted under paragraph 3 of that resolution (S/22558), without going so far as to expressly amend that mandate, because that would mean an open political and legal scandal that could not be covered up. The Commission's work was guided in this way before it took a specific position on the question, because the utmost it had concerned itself with up to that point had not been more than a study of the topic from the technical viewpoint. That also explains the reiterations of the representative of the rulers of Kuwait, in the minutes of the meetings of the Commission, of his readiness to go to the Secretariat and to the Council for the adoption of the desired position on every occasion that he heard in the Commission a view contrary to what he wanted.

The second development concerns the resignation of the Chairman of the Commission as of 20 November 1992, as he explained in his letter dated 4 November 1992 to the Secretary-General. On 6 November, the Chairman of the Commission addressed another, more detailed, letter on the same subject to the Legal Counsel of the United Nations. This letter made it clear that the resignation was due to two causes, the first being a personal reason and the other being that he had "for some time [had] reservations about the terms of reference of the Commission". The Chairman revealed in the above-mentioned letter how he had several times raised with the Legal Counsel some aspects of the Commission's terms of reference; that the offshore boundary (Khawr Abdullah) was not specifically referred to in the 1932 Exchange of Letters, which meant that delimitation was lacking for the Commission on which to base the operation of demarcation entrusted to it; and how the Legal Counsel had explained to him "that any change in the mandate of the Commission by the Security Council was out of the question". The letter explained also that the question had been discussed once again by the Chairman and the Legal Counsel in May and had also been discussed at two meetings held between the Chairman and the Legal Counsel, on the one hand, and the Secretary-General, on the other hand, in July and September 1992. And how the Chairman had "described" the situation that made it "impossible" for him to continue in office "unless certain modifications were made to the mandate of the Commission".

In view of the Chairman's realization of the difficulty of changing the Commission's terms of reference, he saw resignation as the only way open to him.

5. Following the resignation of the Chairman of the Commission, Mr. Nicolas Valticos was appointed Chairman, and its eighth session was held at Geneva from 14 to 16 December 1992, when it decided hastily that the basic principle governing the demarcation of the boundary in the Khawr Abdullah must be the median line, it being understood that the main aim and purpose of the adjustment of the boundary was to facilitate navigational access for both parties!

6. The improper intervention and influence on the work of the Commission which we have mentioned above and which has led to the result already explained, gives rise, in addition to the position that we have indicated, to a number of legal questions that we should like to summarize as follows:

(a) The description of the boundary basically endorsed by the Security Council for demarcation by resolution 687 (1991) and decided on by the report of the Secretary-General submitted under paragraph 3 of the above-mentioned relation in no way touches on a description of the boundary in the Khawr Abdullah area. Accordingly, such description cannot be taken as the basis in any operation of demarcation as carried out by the Commission, because the demarcation must be based on a description, i.e., a delimitation of the boundary agreed on by the parties concerned.

(b) The Khawr Abdullah was not, according to the boundary description adopted by the Security Council in resolution 687 (1991), assigned the characteristic of the territorial sea, for investigation of the principle of its division between States with opposite or adjacent coasts in accordance with the principles of the law of the sea.

(c) The Khawr Abdullah area, even supposing that it were a territorial sea, is correctly described as subject to "special circumstances", as affirmed by the two independent experts also. This, under the 1982 Convention on the Law of the Sea, permits the delimitation of the boundary of the territorial sea to be made by a method other than the principle of the medium line, failing agreement between the two parties on another principle. The provision relating to this case of "special circumstances" gains additional force because of the absence of an agreed formula for the delimitation of the boundary. In other words, the delimitation of the boundary in this area "is being effected for the first time", and thus the "special circumstances" case applies.

(d) Iraq has historic rights in the Khawr Abdullah area, in which the rulers of Kuwait do not carry on substantial navigation, which makes it an exception, according to the 1982 Convention on the Law of the Sea, from the median line rule, as we mentioned in subparagraph (c) above.

(e) The Security Council has no right, pursuant to its functions and powers under the United Nations Charter, to impose a boundary delimitation on a Member State, because, under international law, this sphere of competence is governed by the principle of agreement between the States concerned and because it has, with the precision legally required, no relation to questions of the maintenance of international peace and security that are the sphere of competence of the Council. Thus, the Council has acted ultra vires.

V. Iraq has spent billions of dollars over scores of years on excavation works, the extension, improvement and maintenance of the channels, main and secondary navigation lanes leading into and out of the Khawr Abdullah and the erection of maritime installations, ports and wharfs in the Khawr Abdullah area in order to ensure the flow of its overseas trade. The imposition of the boundary in the Khawr Abdullah area, as decided on by the Boundary Demarcation Commission, presents a grave threat to Iraq's right to enjoy freedom of access to the sea by exercising its historic right to unrestricted and safe navigation in the Khawr Abdullah area, to an extent that will, in the future, place it in the position of a landlocked State.

VI. Lastly, I should like, in closing, to reaffirm once again, our conclusion stated in the letter dated 21 May 1992 from the Minister for Foreign Affairs of the Republic of Iraq addressed to you (S/24044), because it still holds true, now more than at any previous time, regarding the overall outcome of the work of the Boundary Demarcation Commission and the recent unjust resolution adopted by the Council as resolution 833 (1993):

"It becomes clear to every impartial observer that the decisions adopted by the Commission represent a purely political decision imposed by the Powers dominating the Security Council and the United Nations at present, particularly the Governments of the United States and the United Kingdom.

"...

"[That] will constitute a very dangerous precedent, contrary in substance and consequences to the duties and responsibilities entrusted to the Council by the Charter of the United Nations. ... It will not have contributed to the preservation of security and stability in the region but will rather have consciously created a continuous hotbed of tension as well as deliberately violated the legitimate and vital interests of a State Member of the United Nations. If there were compelling circumstances which force the Iraqi authorities to take certain positions regarding this decision, the people of Iraq could never be convinced that its historical rights had been respected and its vital interests safeguarded by the Security Council in a manner compatible with the rules of international law and the criteria of justice and fairness. The Arab nation will continue to view this decision as one link in the chain of Western imperialist games which began after the First World War and which have always been the subject of indignation and rejection on the part of the Arab Nation, and which have caused many of the disturbances and changes witnessed in the Arab Nation. The situation which we witness today is not new to the world, and the world knows the outcome resulting from such instances."

(Signed) Mohammed Said AL-SAHAF
Minister for Foreign Affairs
of the Republic of Iraq
